

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

RENE DIEGO S.,

Claimant,

v.

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH Case No. 2012020502

DECISION

Humberto Flores, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, heard this matter on May 11, 2012, in Los Angeles, California.

Rene Diego S. (claimant) was represented by his parents. Johanna Arias, Fair Hearings and Complaints Coordinator, represented the South Central Los Angeles Regional Center (regional center or SCLARC).

Evidence was received and the matter was submitted for decision on May 11, 2012.

ISSUE

Should the regional center provide funding for claimant to receive discrete trial training (DTT) services?

FACTUAL FINDINGS

1. Claimant is a seven-year-old boy who is a regional center consumer based on a diagnoses of autism.

2. Claimant's parents have been requesting funding for DTT services since he was three or four years old. The regional center did not immediately respond. Claimant's parents raised the issue again in 2009 and 2010. At some point, a regional center representative suggested to claimant's parents that they should seek DTT services from the school district and that the regional center would consider funding for DTT if the school district denied claimant's request for DTT services. In the interim, the regional center agreed to fund 12 hours of DTT services for the month of June 2011. At the beginning of the 2011/2012 school year, claimant's parents made a request of the school district to provide DTT services for claimant. The school district refused to provide the requested DTT services. Throughout this process, claimant's parents maintained their request for regional center funding for DTT services.

3. On October 14, 2011, the service agency issued a Notice of Proposed Action (NOPA) denying claimant's request for funding for DTT services. The regional center based its decision on Welfare and Institutions Code sections 4646, subdivision (a), 4648, subdivision (a)(8), 4648.5, and 4659. In the NOPA, the regional center asserted that DTT is an educational based program and that the school district is the main funding source for this type of service. The NOPA further states that pursuant to section 4648, subdivision (a)(8), regional center funds cannot be used to supplant the budget of any agency (in this case the school district) that has the legal responsibility. Finally, the NOPA states that under section 4648.5, the regional center's authority to purchase educational services for children three to 17 has been suspended. Claimant filed his request for hearing on March 18, 2011.

4. Claimant exhibits a number of challenging behaviors including physical aggression against children and adults. When frustrated he will hit and kick others and stomp his foot. He also engages in self-injurious behaviors such as banging his head against the wall. In addition, claimant lacks safety awareness, which requires him to have continuous adult supervision. Claimant also becomes frustrated because of his inability to express himself both verbally and non-verbally, although speech therapy has helped in this regard. His other behaviors include extreme resistance to controls, inappropriate use of objects, and self-stimulating and ritualistic behavior.

5. Claimant attends the Buena Park Speech and Development Center (SLDC), a Non-Public-School (NPS) program through the Los Angeles Unified School District. He has an adult aide throughout the school day. On June 10, 2011, claimant's mother participated in an Individualized Education Plan (IEP) meeting. Regarding claimant's educational development, the written IEP states that because of claimant's delays in language development, claimant will not meet grade level reading standards. Because of his short attention span, claimant will not meet grade level writing standards. In fact, claimant is not yet able to copy or spontaneously write words; he does not understand what numbers represent; he has difficulty sorting complex characteristics (such as animals, food or vehicles); his communication is echolalic; he is unable to identify alphabet letter sounds; and, his visual-motor integration ability is well below average as he can only reproduce a circle independently.

Regarding claimant's emotional development, the IEP states "Diego has many emotional outbursts when sensory needs are not being met or when he is trying to avoid table tasks. He becomes distressed when he is unable to communicate needs. He hits his head and leg with closed fists (sensory), he throws himself to the floor, kicking screaming, crying, jumps up and down, walks back and forth, crashes into objects and others hurting himself and others in the process, he puts non-edible objects in his mouth, and flings shoes off. . . . Diego does not apologize when he causes harm to others. Harm can be intentional or non-intentional."

Regarding claimant's adaptive functioning, the IEP states that "Diego is still diaper dependent and has not defecated in the [classroom] toilet. . . . Current teacher ratings in the VABS-2 place Diego's overall daily living skills in the well below average. His functioning in the sub-domains of personal, academic and school community [is comparable] to the average functioning of children 3 years 10 months or below. . . . Diego requires continuous adult supervision and guidance to participate in a school setting, maintain safety, follow routines, and complete daily self-care tasks."

Finally, the IEP states that based on collected data from observations by school personnel including his teacher, claimant engages in physical aggressions 21 times a day, engages in foot stomping 88 times a day, and engages in eloping behaviors 11 times a day.

6. Susan Schmidt-Lackner, M.D., a psychiatrist, testified on behalf of claimant. Dr. Schmidt-Lackner is an Associate Professor at UCLA and is the Medical Director of the Childhood Treatment Program at UCLA. She has extensive experience in assessing and treating children with Autism. Dr. Schmidt-Lackner performed an assessment of claimant on February 14, 2012. During the assessment, Dr. Schmidt-Lackner noted that "[claimant] did not respond to his name and engaged in repetitive play. No imaginative play was seen. [Claimant] was able to identify pictures in a book with 80 percent accuracy. [Claimant] was very distractible and wanted to engage in self-stimulatory behavior. He was able to repeat and identify words in a toddler book with about 50 percent accuracy."

Dr. Schmidt-Lackner recommended that claimant receive 15 hours of one-to-one applied behavior analysis (ABA) direct care services per week in the home setting. Dr. Schmidt-Lackner states in her report, "[Claimant's] behavioral disturbance has been increasing dramatically. Diego is extremely deficit in basic self-help skills, such as feeding and toileting. Diego needs the one-to-one repetitive drilling mode of this intervention to acquire basic readiness to learn skills, including increased compliance, increased joint attention, sitting, increased receptive and expressive language, increased safety awareness and self-regulation, and the beginnings of generalization." Dr. Schmidt-Lackner testified at the hearing that it is imperative that claimant receive the recommended services as soon as possible, and that it is essential that claimant's safety awareness improve because his tendency to elope places claimant at imminent risk. It is also important that claimant be toilet trained as soon as possible.

7. Elizabeth Hughes, Ph.D., a psychologist, is the Director of Child and Adolescent Services for the Institute of Applied Behavioral Analysis (IABA). Dr. Hughes testified that IABA completed a comprehensive functional assessment of claimant on May 2, 2012. The assessment included interviews with parents, claimant's speech therapist, claimant's teacher, and IABA support staff. Claimant was also observed for three hours at his home and for one-half hour during a speech therapy session. Dr. Hughes testified and wrote in her report that claimant has not developed many of the skills necessary for safe community participation. He lacks a sense of danger and lacks impulse control. He will run into the street or through a parking lot without considering his surroundings. Dr. Hughes testified that while claimant's current school is "better than his last school for claimant's learning and support needs, it is lacking the necessary intervention to address his behavioral, communication, higher cognitive functioning, self-regulation, and other skill deficits impacting his learning readiness."

Dr. Hughes recommended in her report that claimant "receive DTT to further facilitate attending, imitation and language skills." Dr. Hughes further stated in her report that "Diego presented with verbal abilities that were below age-expectations during this assessment. It was estimated that Diego engaged in age-appropriate communication in 10% of opportunities. That Diego has acquired a steady rate of responding and skill acquisition at the 12 hours a month initially funded by SCLARC . . . and periodic authorizations of 24 hours per month, is a testament to this methodology's potential for [addressing] long term need and for less restrictive behavioral treatments over time. . . . As demonstrated by data from Diego's parents' implementation of a limited DTT program, he has the ability to learn via DTT and acquire new skills. Even though this intervention is sometimes not effective with older children, this is not the case with Diego. He responds consistently with DTT style intervention, and is able to gain necessary skills in this setting. Diego has acquired skills related to language/communication, self-help, imitation, attention, and social skills via a limited DTT intervention delivered by his parents. That such progress has been made with this limited intervention shows Diego's ability to progress if this structure is provided."

Dr. Hughes agreed with Dr. Schmidt-Lackner that claimant should receive 15 hours of DTT per week. In addition, Dr. Hughes recommended that claimant's parents receive 10 hours of consultation per month. Dr. Hughes and her assessment team at IABA performed a thorough and meticulous assessment and generated a comprehensive written report. Her testimony was given great weight.

8. Claimant presented written reports based on assessments conducted by a psychiatrist, a pediatrician, a license occupational therapist, and numerous psychologists. All of the above referenced professionals recommended that claimant should receive in-home intensive ABA and/or DTT.

9. Claimant's mother testified that the family has been asking the regional center to fund DTT for more than three years. Initially, the regional center did not act on the request. Then, in 2011, the regional center provided temporary funding for 12 hours of DTT

for the month of June. In July 2011, the regional center funded another three months of DTT. Throughout this process, the regional center has maintained that DTT is an educational service that should be funded by the school district and that the regional center would only supplement the services provided by the school district. However, at the hearing a regional center program manager testified that in the event that a school district denies funding for DTT, the regional center would consider funding for this service.

LEGAL CONCLUSIONS

1. In 1977, the California Legislature enacted the Lanterman Developmental Disabilities Services Act (the Lanterman Act) “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.” (See, *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.). Under the Lanterman Act, the State of California has accepted responsibility for persons with developmental disabilities. (Welf. & Inst. Code, § 4501.)

2. The regional center contends that DTT is strictly an educational program and is therefore prohibited from funding this service under Welfare and Institutions Code section 4648.5. The regional center’s contention is not persuasive as claimant presented evidence from numerous experts that in-home DTT is essential for claimant to progress and to have any chance at some independence. Welfare and Institutions Code section 4648.5 suspended regional centers’ authority to purchase certain services pending implementation of more permanent budgetary solutions. The targeted services are: 1. Camping services and associated travel expenses; 2. “Social recreation” activities, except for those activities vendored as community-based day programs; 3. Educational services for children three to 17, inclusive, years of age; and 4. Non-medical therapies, including, but not limited to, specialized recreation, art, dance and music. (Welf. & Inst. Code, § 4648.5, subd. (a).) The new statute also provides:

An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychological effects of the consumer’s developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer’s needs. (Welf. & Inst. Code, § 4648.5, subd. (c).)

3. In this case, the evidence supports the conclusion that DTT, in the particular case of claimant, is a “critical means for ameliorating the physical, cognitive, or psychological effects of the consumer’s developmental disability.” Virtually all of the health

care and mental health professionals who have assessed claimant agree that it is imperative that claimant receive DTT services to address a myriad of behavior and educational difficulties that face claimant on a daily basis. Therefore, even if the regional center's contention is correct that DTT is educational, claimant qualifies for an exemption from the suspension of DTT services.

4. Claimant established the critical need for DTT services at the rate of 15 hours per week. The Los Angeles Unified School District is responsible and authorized to provide funding for educational services such as DTT. However, the school district refused to fund the requested DTT service. Under these circumstances the regional center should provide the necessary funding on an interim basis for reasonable period of time so that claimant can take the necessary steps to obtain the service from the school district.

ORDER

The decision of the South Central Los Angeles Regional Center denying claimant's funding request for DTT services is overruled. Claimant's appeal is granted. The regional center shall forthwith provide funding for claimant to receive 15 hours of DTT per week for a period of six months. Should the school district agree to provide such funding prior to the expiration of six months, the regional center's duty to provide funding for DTT services shall terminate.

Dated: May 17, 2012

HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.